In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1393

CECIL E. DANIEL and ANN M. DANIEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion is not reported. The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 454 F. 2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1972. The petition for a writ of certiorari was filed on April 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there is evidence in the record to support the district court's finding that statutory notices of

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disallowance of petitioners' claims for refund had been mailed to them more than two years prior to the filing of their tax refund suit, thus compelling dismissal of their suit for lack of jurisdiction.

STATUTE INVOLVED

The pertinent portions of Section 6532(a)(1) of the Internal Revenue Code of 1954 are set forth in the petition (p. 2).

STATEMENT

On January 17, 1961, petitioners paid income tax deficiency assessments for the years 1955 and 1956 in the total sum of $28,706.70, including accrued interest. On May 9, 1961, petitioners filed claims for refunds of this amount. Approximately six and one-half years later, on January 29, 1968, petitioners instituted the present refund suit. (R. 1a, 7a–8a.)[1] In answer to petitioners' complaint in the district court, the government contended that it had mailed statutory notices of disallowance to the petitioners on July 31, 1962, and that since the refund suit had been instituted more than two years after that date, Section 6532(a)(1) of the Internal Revenue Code of 1954 deprived the court of jurisdiction to consider petitioners' claims.

At an evidentiary hearing in the district court, the government endeavored to prove that the statutory notices—the receipt of which had been denied by petitioners—had in fact been mailed, and that the refund

[1] "R." references are to the separately bound record appendix in the court of appeals, a copy of which we have lodged with the Clerk of this Court.

action was untimely filed. Petitioners admitted that if the notices had been mailed, as claimed by the government, they were not entitled to recover. (R. 117a.)

Due to the large volume of mail which is processed through an Internal Revenue Service office, and the length of time elapsed since the notices had been mailed, it would not have been possible for the individual who had prepared and mailed these denials to identify them and testify that they had been mailed. Under these circumstances, the government relied on "office custom" to show the usual procedure which is followed in handling such mail. Individuals, who (during 1961 and 1962) had been the supervisors of the units at the Internal Revenue Service office which issued denials to taxpayers living in petitioners' locality, testified as to the procedures which invariably were followed in handling denials. Copies of the forms sent to petitioners and the attached receipts for certified mail were presented in evidence. (Deft. Exs. 2, 4, R. 14a, 16a.) The government also introduced the testimony of witnesses indicating that these notices were not returned to the government as undelivered mail.

The district court, on the basis of the above evidence and testimony, determined that the denial notices had been sent and, accordingly, dismissed the suit. (R. 135a–140a, 142a.) The court of appeals held that this factual finding was not clearly erroneous and affirmed per curiam. (Pet. App. 1a–2a.)

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review of the district court's factual determination.

Petitioners' only claim is that the district court's finding that these denial notices were mailed is clearly erroneous because of its application of the "office custom" rule. The government introduced testimony as to the office custom which was uniformly followed in the preparation and mailing of these denial notices. Testimony as to an "office custom" which is invariably followed has repeatedly been held sufficient to prove mailing.[2] *E.g., Myers* v. *Moore-Kile Co.*, 279 Fed. 233, 235–236 (C.A. 5); *Roupp* v. *Woods*, 177 F. 2d 149, 151 (Em. App.). In any event, copies of the denial notices were also introduced into evidence, as were the sender's receipts for certified mail. These receipts alone have been held to be sufficient to show mailing even without reliance on office custom. *United States* v. *Wolfson*, 322 F. Supp. 798, 815 (D. Del.).

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[2] Petitioners claim (Pet. 6–7) that "office custom" was not followed in their case because (1) the denial notice forms and certified mail receipts bore several staple marks and (2) the forms are dated July 31, 1962, while the receipts are dated July 30, 1962. Neither of these facts, which are presumably the results of routine clerical errors, indicates that the customary procedure for the mailing of the forms was not followed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972